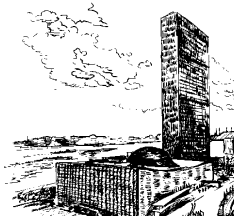


## Part 6



## Legal Developments

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### International Court of Justice (ICJ)

The ICJ is the principal judicial organ of the United Nations. The Court decides cases submitted to it by states and gives advisory opinions on legal questions at the request of international organizations authorized to request such opinions. In recent years, the Court has had more cases on its docket than ever before.

The Court is composed of 15 judges, no two of whom may be nationals of the same state. During 1998, the Court was composed as follows: Stephen M. Schwebel (United States—President), Christopher G. Weeramantry (Sri Lanka—Vice President), Mohammed Bedjaoui (Algeria), Shigeru Oda (Japan), Gilbert Guillaume (France), Raymond Ranjeva (Madagascar), Géza Herczegh (Hungary), Shi Jiuyong (China), Carl-August Fleischhauer (Germany), Abdul G. Koroma (Sierra Leone), Vladlen S. Vereshchetin (Russia), Rosalyn Higgins (United Kingdom), Gonzalo Parra-Aranguren (Venezuela), Pieter H. Kooijmans (Netherlands), and Jose F. Rezek (Brazil).

The UN General Assembly and the Security Council, voting separately, elect the judges from a list of persons nominated by national groups on the Permanent Court of Arbitration. Judges are elected for nine-year terms, with five judges elected every three years. The next round of elections will be held in the fall of 1999, when five seats will be up for election or reelection.

At elections held by the Court on February 6, 1997, Judge Stephen M. Schwebel of the United States was elected President of the Court for a three-year term.

The United States has been involved in the following matters in the Court since the last report.

### Iran v. United States of America

On November 2, 1992, Iran brought a case against the United States claiming that U.S. military actions against Iranian oil platforms in the Persian Gulf during the conflict between Iran and Iraq violated the 1955 Treaty of Amity between the United States and Iran. The incidents cited

by Iran followed attacks by Iranian military forces against United States naval and commercial vessels in the Gulf. The United States filed a Preliminary Objection to the Court's jurisdiction, which was considered at hearings in September 1996. In December 1996, the Court rendered a decision agreeing with the U.S. position that the Court did not have jurisdiction under two of the three treaty articles invoked by Iran, but concluding that it had jurisdiction to consider a third treaty claim. On June 23, 1997, the United States filed its Counter-Memorial and a counter-claim. Iran objected to the admissibility of the U.S. counter-claim, and the United States and Iran subsequently filed documents presenting their positions. By an order dated March 10, 1998, the Court held that the U.S. counter-claim was "admissible as such" and directed the parties to submit further written pleadings on the merits. Iran twice requested and received additional time to file its Reply. Pursuant to the Court's order of December 9, 1998, Iran's Reply is due on March 10, 1999, and the U.S. Rejoinder on November 23, 2000.

### **Libyan Arab Jamahiriya v. United States of America**

On March 3, 1992, Libya brought cases against the United States and the United Kingdom charging violations of the 1971 Montreal (Air Sabotage) Convention. Libya claimed that the United States and the United Kingdom interfered with Libya's alleged right under the Montreal Convention to try two persons accused by U.S. and Scottish authorities of bombing Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988. On June 20, 1995, the United States filed Preliminary Objections to the Court's jurisdiction in the case; the United Kingdom also filed Preliminary Objections. The Court held a hearing on the U.S. and U.K. Preliminary Objections on October 13-22, 1997. On February 27, 1998, the Court issued a judgment denying some of the U.S. and U.K. Preliminary Objections and holding that others could be decided only at the merits stage of the case. The Court then ordered the United States to file its Memorial by December 31, 1998. On December 8, 1998, the United States asked the Court for a three-month extension, in order to ascertain whether Libya would respond to an initiative by the United States and the United Kingdom proposing constitution of a Scottish court in the Netherlands to try the two suspects. By Orders dated December 17, 1998, the Court extended the filing date for the U.S. and U.K. Counter-Memorials until March 31, 1999.

### **Paraguay v. United States of America**

On April 3, 1998, Paraguay brought suit against the United States, claiming that because the United States had not complied with its obligation under the Vienna Convention on Consular Relations to notify an arrested Paraguayan national of his right to contact a Paraguayan consul, that person was entitled to a new trial. The case grew out of the murder conviction and death sentence in Virginia of Mr. Angel Francisco Breard.

Virginia officials did not tell Mr. Breard that he was entitled to contact Paraguay's consul. Mr. Breard's execution was scheduled for April 14, 1998.

Paraguay requested provisional measures of protection against the United States. The Court held an emergency hearing on that request on April 6, 1998. The United States took part in that hearing and opposed Paraguay's request for relief. On April 8, 1998, the Court issued an Indication of Provisional Measures, requesting that the United States take all measures available to delay Mr. Breard's execution pending further proceedings in the Court. Secretary of State Albright wrote Governor Gilmore of Virginia requesting that Mr. Breard's execution be delayed. Governor Gilmore declined to do so. On April 14, the Supreme Court of the United States denied a stay of execution and Mr. Breard was executed.

On November 2, 1998, the Government of Paraguay informed the Court that it did not wish to continue the proceedings, and asked the Court to remove the case from its list. On November 3, 1998, the United States concurred. On November 10, the Court made an Order ending the case.

### **Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights**

On August 5, 1998, the UN's Economic and Social Council (ECOSOC) adopted a resolution requesting an advisory opinion from the International Court of Justice concerning the privileges and immunities of Dato' Param Cumaraswamy, the UN Human Rights Commission's Special Rapporteur on the Independence of Judges and Lawyers. ECOSOC was concerned that the Special Rapporteur had not been granted immunity from libel suits in Malaysian courts based on statements in an interview that were related to his mandate as Special Rapporteur. Pursuant to the Court's Rules, the United States filed a written statement supporting the Special Rapporteur's immunity from suit on October 7, and subsequently filed comments on the written statements filed by other governments. The Court held a hearing December 7-10, 1998. (The court delivered an advisory opinion on April 29, 1999 affirming the Special Rapporteur's immunity.)

### **International Law Commission (ILC)**

The ILC was established in 1948 to promote the codification and progressive development of international law. Its 34 members, persons of recognized competence in international law who serve in their individual capacities, are elected by the General Assembly for five-year terms. Mr. Robert Rosenstock of the United States is serving his second term as a member of the Commission.

The Commission studies international law topics referred to it by the General Assembly or that it decides are suitable for codification or progressive development. It usually selects one of its members (designated a

“special rapporteur”) to prepare reports on each topic. After discussion in the Commission, special rapporteurs typically prepare draft articles. These are considered and refined in a drafting group prior to formal adoption by the Commission. The Commission reports annually on its work to the General Assembly.

At its 1998 session, the Sixth Committee of the General Assembly followed past practice and held a detailed debate on the ILC’s report on its 50th session, which—in a departure from past practice—was divided into two sessions, one in Geneva and a second in New York. This debate indicated widespread support among governments for the Commission’s activities overall and for its efforts to reform and improve the relevance, quality, and timeliness of its work.

During its 1998 session, the Commission began its second reading of its articles on state responsibility, producing several clarified and simplified articles. It also completed the first reading of a set of articles on “prevention,” began work on guidelines concerning reservations to treaties, reviewed initial reports on unilateral acts of states and on diplomatic protection, examined aspects of nationality in relation to succession, and considered other matters. The Commission also elaborated a tentative list of future topics.

The Commission continued to implement its five-year work program established in 1997. This plan anticipates that each topic under consideration by the Commission either will be completed or brought to a defined transitional point by the end of the Commission’s session in 2001. The Commission’s goal is to ensure the orderly and efficient progress of its work and to lessen disruptions such as those resulting in the past from retirements of special rapporteurs or other personnel changes.

## **UN Commission on International Trade Law (UNCITRAL)**

UNCITRAL, established by General Assembly Resolution 2205 (XXI) in 1966, has maintained a technically focused program on harmonizing national laws to promote trade and commerce. It has generally avoided political issues that may arise in the work of other bodies. UNCITRAL’s headquarters are in Vienna, Austria. UNCITRAL usually holds up to four weeks of working group meetings annually on each active topic. The topics are reviewed at UNCITRAL’s annual plenary session (document A/53/17).

### **Pending Legislation to Implement the UN Model Law on Cross-Border Insolvency**

UNCITRAL completed, in 1997, the UN model law on procedural aspects of cross-border insolvency in commercial matters, which emphasized cooperation between judicial and administrative authorities of states involved, and a mandatory but limited freeze on assets and other measures

which would allow time for parties in various countries to collectively seek economic relief or reorganization (A/CN.9/442). Legislation designed to implement the UNCITRAL model law as amendments to the U.S. bankruptcy code received the support of the Senate and House Judiciary Committees and the Administration, but was not enacted due to end-of-session delays. Legislation was expected to be reintroduced and enacted in the next Congress. Proposals were made to continue work between judicial, legislative, and private sector interests in various countries to explore whether additional areas of insolvency law might be harmonized.

### **Draft Convention on Commercial Finance**

The United States continued to support, at meetings of the Working Group on International Contract Practices, the drafting of a convention which would significantly upgrade world standards for private sector commercial finance, based on movable property as collateral. The World Bank, the Inter-American Development Bank, and other organizations have estimated that such changes in national laws could increase available commercial credit at least 20-30 percent in many developing countries. Consensus was reached on the key aspects of modern commercial finance law, and completion of negotiations is on track for the Commission's plenary session in 2000 (A/CN.9/455). The United States continued to support an optional annex which would authorize an internationally based computerized registry for commercial lending for states which choose to adopt that system.

### **International Project Finance**

The Commission continued its support for work on a legislative guide and model provisions for countries wishing to increase their ability to obtain private sector financing, primarily to implement infrastructure projects, such as utilities, power supplies, water service, roadways, and telecommunications. This development parallels a significant increase in private sector and public funding partnerships, which allows infrastructure development to take place while reducing the extent of public debt, especially in countries where development resources may be limited. The Commission's work sought to balance assurances required for long-term private sector financing, development, and management of public services with the needs of host countries to properly monitor and regulate the provision of services (A/CN.9/444 and Addenda). Completion of this project is possible in 2000.

### **Electronic Commerce**

The Working Group on International Electronic Commerce continued its work on draft rules for message authentication and signatures, but encountered increasing difficulty in reaching consensus on the direction such rules should take, placing in question the ability to achieve rules

which might receive widespread adoption (A/CN.9/454). The United States, along with a minority of states, continued to press for restraint on development of rules at this early stage in development of technologies and testing of methods in the commercial marketplace. A number of European Union and other states have sought instead a more regulatory approach which would favor certain existing technology applications. The United States introduced a proposal for a draft convention which would embody many provisions of the 1996 UNCITRAL Model Law on Electronic Commerce, which has achieved wide effect. Bilateral support increased for this proposal, but an international forum has not yet emerged.

### **Future Work**

The Commission continued to ascertain from states, other international bodies, and industry and private commercial sector interests their views on areas of international trade and commercial practice which might benefit most from work to be placed on its agenda. Included in the topics on which support had grown were implementation of the 1958 “New York” convention on enforcement of foreign arbitral awards, and possible amendments to the convention or new provisions on matters not covered (A/CN.9/460); and reconsideration of existing treaty systems and national laws on international surface transportation of goods, including liability for carriage and loss. The International Maritime Committee and others are participating in that process.

### **Support for International Recognition of Law Unification Work**

The Commission, with U.S. support, continued to promote implementation of its work by a wider variety of states at all levels of economic development, including the convening of an international colloquium at UN headquarters in New York. Publication of decisions in UN member states involving UNCITRAL-prepared conventions, model laws, and other texts continued through the work of national correspondents, and is available in all official UN languages through the CLOUT system (Case Law on UNCITRAL Texts) approved by participating states at UNCITRAL (A/CN.9/SER.C/index and abstracts). The Commission continued to endorse increased efforts by the Secretariat to extend its “Training and Technical Assistance” program to as many regions as possible, with an emphasis on support for developing and emerging states (A/CN.9/461). In this manner, the United States and others noted that commercial law reform on which consensus has been reached at UNCITRAL is made more accessible and can have a more beneficial effect on the economies of many states.

## International Criminal Court (ICC)

A diplomatic conference convened under UN auspices in Rome in June-July 1998 adopted a treaty to create an international criminal court. The treaty, which the United States voted against, now requires ratification by 60 countries to enter into force. It provides for a court which will have jurisdiction to prosecute individuals who commit crimes of serious concern to the international community as a whole, including genocide, war crimes, and crimes against humanity. The crime of aggression is to be added to the jurisdiction of the court once a definition is agreed upon and the treaty is amended to include it.

In 1994, the General Assembly established an *ad hoc* committee to review the major substantive and administrative issues arising out of a draft treaty text submitted by the International Law Commission (ILC). On the basis of the *ad hoc* committee's work, the General Assembly, in Resolution 50/46, decided to establish a Preparatory Committee to study further the issues raised by the ILC text and prepare a widely acceptable instrument for consideration at a diplomatic conference.

The Preparatory Committee met for six weeks in both 1996 and 1997, and for three weeks in 1998 prior to the Rome diplomatic conference. The United States participated actively in all the Preparatory Committee meetings and in Rome, seeking to facilitate creation of a fair, efficient, and effective international criminal court.

A number of important U.S. objectives concerning court composition, administration, and procedures were achieved and incorporated into the Rome treaty text. With the exception of the undefined crime of aggression, the United States was also generally satisfied with the substantive scope of the court's jurisdiction, including its coverage of internal armed conflicts and the definitions of war crimes and crimes against humanity. However, the final text also contained certain fundamental flaws. These flaws forced the United States to call for a vote at the end of the diplomatic conference and to vote against adoption of the treaty.

First, and most objectionable, is the purported extent of the court's jurisdiction, which would reach nationals, and thus the official acts, of states that have not consented to the treaty. Other features of major concern include: a provision on amendments which allows states parties—but not those countries outside the treaty—to exempt their nationals from application of any expanded jurisdiction of the court; the broad powers of the Prosecutor to initiate investigations and cases; and a provision prohibiting states from taking reservations to any part of the treaty.

In December 1998, the General Assembly adopted, by consensus, Resolution 53/105, which acknowledged the historical significance of the Rome treaty and established a Preparatory Commission to elaborate Rules of Procedure, Elements of Crimes, and other necessary implementing instruments for the court. The Preparatory Commission is to meet three

times in 1999, for a total of eight weeks of work. The General Assembly further decided to place the establishment of the proposed court on its agenda for the 54th session.

## **UN Decade of International Law**

In Resolution 44/23 of November 17, 1989, the General Assembly declared the period 1990-1999 the UN Decade of International Law (UN Decade). The four major goals of the UN Decade are to: promote acceptance of and respect for the principles of international law; promote means and methods for the peaceful settlement of disputes between states, including resort to and full respect for the International Court of Justice (ICJ); encourage progressive development of international law and its codification; and encourage the teaching, study, dissemination, and wider appreciation of international law. In 1997, the General Assembly adopted a Program of Action presented by the Governments of Russia and the Netherlands dedicated to the centennial of the first International Peace Conference (held in 1899) aimed at contributing to the further development of the themes of the first and second International Peace Conferences. This Program of Action does not entail budgetary implications for the United Nations. During its 53rd session, the General Assembly adopted Principles and Guidelines for International Negotiations based on a proposal by Mongolia.

Many of the Decade's activities have been in implementation of the last goal. In particular, recent advances in technology have facilitated the wider dissemination of international law. The ICJ has launched an effective Internet web site, providing immediate access to ICJ judgments and oral pleadings. In 1997, the General Assembly encouraged the UN Secretariat to continue developing a policy of providing Internet access to UN treaty information. A group of "Friends of the Decade" have developed a program of special activities for 1999.

Under its Rule of Law Program, the United States provided grants to governments and nongovernmental organizations to enable them to gain access to the Internet and computer databases containing treaty texts and other international legal materials. The United States has actively supported the Decade and encouraged U.S. bar associations and other relevant organizations to actively participate.

## **Host Country Relations**

The UN General Assembly established the 15-member Committee on Relations with the Host Country in 1971 to address issues relating to the implementation of the UN Headquarters Agreement and the Convention on the Privileges and Immunities of the United Nations.

Committee discussion during 1998 focused primarily on the following topics: a review of the membership and composition of the Committee, security of missions and the safety of their personnel, privileges and



immunities, parking and related matters, travel restrictions, and indebtedness/health insurance.

By Resolution 52/159, the General Assembly asked the Committee to review its membership and composition. Representatives of Cuba, Malaysia, Malta, and Syria, all of whom participate in the work of the Committee as observers, lobbied hard for an increase in the size of the Committee. The U.S. representative noted that the Committee had worked very efficiently, largely because its membership was limited but representative, and urged fellow Committee members not to fix something that was not broken. Over the course of several meetings, it became increasingly clear, however, that the U.S. position would not prevail and that some increase in size was inevitable. The final recommendation, which was accepted by consensus, was to increase the size by four, one each from the African, Asian, Latin American and Caribbean, and Eastern European groups.

On December 8, the General Assembly adopted a resolution, "Report of the Committee on Relations with the Host Country," by consensus. The resolution endorsed the Committee's recommendation to increase its size by four members, welcomed the efforts of the Committee to identify affordable health-care programs for the diplomatic community, called upon the host country to continue its efforts with respect to the parking issue, and once again asked the host country to consider removing the remaining travel controls on missions and Secretariat staff of certain nationalities. Finally, the resolution expressed the Committee's appreciation to the host country for its work in maintaining appropriate conditions for the work of the missions accredited to the United Nations.

The UN General Assembly President subsequently appointed Cuba, Hungary, and Libya to three of the four new seats on the Committee. The Asian group has not, to date, reached consensus on which delegation should be appointed.

## International Terrorism

The General Assembly, on December 8, adopted by consensus "Measures to Eliminate International Terrorism," Resolution 53/108, which reaffirmed the "Declaration on Measures to Eliminate International Terrorism" (adopted in 1994 and supplemented in 1996). The Declaration unequivocally condemns all acts, methods, and practices of terrorism, and also reaffirms that perpetrators of terrorist acts are excluded from refugee protection.

The resolution urges all member states that have not yet done so to become parties to the eleven conventions outlawing international terrorism. Also included in the terrorism resolution is a decision to have the *ad hoc* Committee, which was established by the General Assembly in 1996, continue its work, with meetings scheduled in March 1999 and during the General Assembly in the fall of 1999. The *ad hoc* Committee is charged with completing the elaboration of a draft international convention for the

suppression of acts of nuclear terrorism and commencing work on a draft international convention for the suppression of terrorist financing.

## **Strengthening the Role of the United Nations**

The Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (Charter Committee) held its 23rd annual session January 26-February 6, 1998. A resolution adopting the report of the Committee's work, and a resolution on its agenda item concerning "Implementation of Charter Provisions Related to Assistance to Third States Affected by the Application of Sanctions," were debated and adopted during the UN General Assembly Sixth Committee meetings in the Fall. The resolutions were subsequently adopted, without votes, by the General Assembly on January 20, 1999 (Resolutions 53/106 and 53/107).

The Special Committee recommended to the General Assembly that it consider, in an appropriate substantive manner, the report of the Secretary General on the results of the June 1998 *ad hoc* expert group meeting on methodological approaches to assessing the third-country effects of sanctions. The Special Committee also recommended to the General Assembly that its future sessions be scheduled, to the extent possible, later in the first half of any given year. Both of the Special Committee's recommended actions were taken by the General Assembly (the latter with respect to the 1999 meeting of the Special Committee).

## **International Criminal Tribunals for Rwanda and the former Yugoslavia**

The International Criminal Tribunals for Rwanda and the former Yugoslavia have jurisdiction over genocide and other serious violations of international humanitarian law. The UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in May 1993, and the International Criminal Tribunal for Rwanda (ICTR) in November 1994. The Tribunals share a Chief Prosecutor, Justice Louise Arbour of Canada, who assumed her position on October 1, 1996. The Chief Prosecutor and the Deputy Prosecutor for the ICTY are located in The Hague. The Rwanda Tribunal hears cases in Arusha, Tanzania, and the office of its Deputy Prosecutor is located in Kigali, Rwanda.

As of the end of 1998, the ICTY had publicly charged 80 individuals (an unknown number of persons may be named in sealed indictments) with genocide and other serious violations of international humanitarian law. Thirty-five indictees had been taken into custody. Two had been killed resisting arrest. One prisoner committed suicide and one died of natural causes in ICTY custody. Seven trials were held by the ICTY in 1998; four defendants were found guilty, one was acquitted, and one committed suicide before the verdict in his trial was announced. One trial is ongoing.

The very substantial increase in the ICTY's caseload over a relatively short period of time greatly strained its resources. On May 13, the Security Council passed Resolution 1166 to create a third trial chamber consisting of three additional judges. On June 12, the ICTY formally inaugurated its third courtroom, built by a joint Dutch-U.S. donation. In late December, the General Assembly approved a budget of about \$103.5 million, a substantial increase over the ICTY's 1998 budget, in order to ensure that it has the resources to respond to the additional caseload.

As of the end of 1998, the ICTR had charged 45 individuals (an unknown number of persons may be named in sealed indictments) with genocide and other serious violations of international law. Thirty-five are in custody in Arusha. One additional indictee remains in custody in the United States while he seeks in the courts to avoid surrender to the Tribunal. Two individuals pleaded guilty to committing genocide and other crimes. The ICTR also obtained a conviction for genocide, the first ever by an international tribunal.

On April 30, the Security Council passed Resolution 1165 creating a third trial chamber consisting of three additional judges to enable the Tribunal to more effectively cope with its increased work load. In December, the General Assembly approved a substantial increase in the ICTR's budget.

In 1998, the United Nations Office of Internal Oversight Services issued a follow-up report on its 1997 report on its investigation of alleged mismanagement of the ICTR. Although progress has been made, the United States and other governments continue to press the ICTR to work to correct the problems and to improve the efficiency and effectiveness of the Tribunal.

## **Law of the Sea**

The 1982 UN Convention on the Law of the Sea (LOS Convention) entered into force on November 16, 1994. Partly to meet U.S. concerns, a supplementary "Agreement Relating to the Implementation of Part XI" (Deep Seabed Mining) was negotiated in 1994, and entered into force on July 28, 1996. As of the end of 1998, a total of 130 states had ratified the Convention, and 94 states had ratified the Agreement.

The United States supports the LOS Convention as modified by the 1994 Agreement and applied the Agreement on a provisional basis, in accordance with its terms. Provisional application, however, terminated in November 1998. The Administration is working to obtain the necessary advice and consent of the U.S. Senate to permit accession to the Convention. Taken together, the Convention and the Agreement meet a basic and long-standing objective of U.S. oceans policy: conclusion of a comprehensive Law of the Sea Convention that will be respected by all nations.

The International Seabed Authority (ISA) held its fourth meeting in two separate sessions in 1998. All four of its organs—the Assembly, the Council, the Legal and Technical Commission, and the Finance Committee—met during the sessions. The ISA Legal and Technical Commission continued its review of a draft mining code and model contract which incorporated many of the previous comments by the United States and submitted it to the Council for its review. The Council began consideration of the mining code. In an effort to address the costs to the Parties, the Authority approved a 1999 budget which called for only one meeting in 1999. The budget was virtually unchanged.

The International Tribunal for Law of the Sea, also a LOS body, continued its deliberations on a prompt release of vessel case. The meeting of states parties met and approved its 1999 budget. The budget was slightly increased to take account of the case load of the Tribunal.